

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Common Pleas Court Case No. 2019-CP-07-01246
Appellate Case No. 2021-000375

Greg Marcus Simmons and Jermaine Robinson, individually and derivatively
on behalf of Simmons Family Holdings, LLC.....Respondents

vs.

Palmer E. Simmons, individually and as Trustee of the Charles E. Simmons Jr. and Rosa G.
Simmons Revocable Trust dated May 5, 2016, and Charlesetta S. Aiken all of whom are
defendants and Simmons Family Holdings LLC, as a nominal defendant,

of whom,

Palmer E. Simmons, individually and as Trustee of the Charles E. Simmons Jr. and Rosa G.
Simmons Revocable Trust dated May 5, 2016,
and Charlesetta S. Aiken areAppellants/Petitioners

Respondents’ Return to Appellants’ Petition for Rehearing

COME NOW the Respondents, in return to Appellants’ Petition for Rehearing, which
offers this Court little more than a regurgitation of the same baseless and flawed arguments that
this Court (like the trial court before it) considered and properly rejected. Appellants’ Petition
should be denied for several reasons, including:

I. Appellants' Petition should be denied or stricken for violation of Rule 221(a), SCACR.

Rule 221(a), SCACR, provides that “[a] petition for rehearing shall not exceed fifteen (15) pages.” Appellants’ petition—at 27 pages—vastly exceeds the parameters of this rule. Therefore, this Court should deny Appellants’ Petition or alternatively strike those portions of the Petition offered in violation of this rule.

II. Appellant’s assertion that the concepts of waiver and estoppel were not before this Court is factually incorrect and inconsistent with the law.

This Court found summary judgment in favor of Respondents was proper because Appellants, “as co-managers of [the Company] and Palmer, in his capacity as personal representative of [Charles’] estate and trustee of the Trust, operated as if [Respondents] were members of the [Company] and failed to challenge the validity of their membership. . .” (Opinion at p. 1).

“When reviewing a circuit court's order from a motion for summary judgment, appellate courts sit in the same position as the circuit court.” *S.C. Pub. Interest Found. v. Calhoun Cty. Council*, 432 S.C. 492, 495, 854 S.E.2d 836, 837 (2021). Moreover, “[t]he **appellate court may affirm** any ruling, order, decision or judgment **upon any ground(s) appearing in the Record on Appeal.**” Rule 220(c), SCACR (emphasis added); *see also, Covil Corp. v. Pa. Nat'l Mut. Cas. Ins. Co.*, 436 S.C. 85, 94, 870 S.E.2d 191, 196 (Ct. App. 2022) (wherein this Court found waiver to be a sufficient reason appearing in the record to affirm the trial court’s grant of summary judgment).

Appellants’ suggestion that waiver is not a reason appearing in the record is simply and demonstrably wrong. Respondents’ Memorandum in Support of Summary Judgment argued that because Appellants consistently recognized Respondents as members of the Company “[Appellants] should [therefore] be **estopped** from asserting otherwise.” Respondents also arguing

that Appellants had “**waived** or consented [to]” the way in which Respondents were added as members. (R. p. 225) (emphasis added).

The suggestion that these issues are not in the record borders incredulity. Appellants’ Memorandum in Reply to Respondents’ Motion for Summary Judgement expressly acknowledged Respondents’ waiver argument. (R. p. 352) (Appellants recognizing and responding to Respondents’ argument that “the requirements for addition of members have been **waived**”) (emphasis added). Appellants plainly understood waiver to be an integral issue before the trial court and cannot now assert it was never raised.¹

III. This Court correctly affirmed the trial court’s partial grant of summary judgment because Appellants conceded there is no question of fact concerning Respondents’ membership.

In challenging this Court’s decision to affirm the trial court’s grant of partial summary judgment, Appellants’ fundamental argument is that there is a disputed question of material fact concerning Respondents’ membership in the company. *See* (Pet. Rehearing p. 3) (“On appeal, Appellants argued that the evidence (and inferences to be drawn from it) was very much disputed, and that conflicting evidence made summary judgment improper[.]”); *see also* (Pet. for Rehearing pp. 7, 9, 10, 12, and 20) (all referencing or alluding to the purported existence of disputed issues of fact). This is wrong for two reasons.

¹ Despite Appellants contention this Court’s relied on estoppel, it should be noted that this Court relied on *waiver*, not estoppel. This is largely a distinction without consequence because the two concepts are indistinguishable in this case—*i.e.*, by waiving objection to how Respondents were added as members, it results that Appellants are estopped from denying that membership. *Accord, Strickland v. Strickland*, 375 S.C. 76, 86, 650 S.E.2d 465, 471 (2007) (the Supreme Court “has acknowledged that the distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradation”). However, Respondents point this out only because at Footnote 3 of their Petition, Appellants make the inconsequential assertion that Respondents’ brief does not discuss estoppel—but only waiver.

First, Appellants conceded there was no question of material fact in their own Motion for Summary Judgment. *See* (R. p. 196) (Appellants arguing “Because the [Respondents] are unable to demonstrate the existence of any indication that their inclusion as members of [the company] is compliant with the terms of the Operating Agreement, **there is no genuine dispute of material fact as to whether [Respondents] are members of [the company].**”) (emphasis added). In their cross motion, Respondents asserted that they *are* members of the Company. “Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law.” *Wiegand v. United States Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011). Appellants seek to have it both ways. This flawed logic poisons all aspects of Appellants’ argument and demonstrates why this Court should deny the Petition. *See also* (Resp. Br. pp. 15-24).

Second, the “questions of fact” allegedly in dispute are manufactured by Appellants’ own inconsistencies and self-contradictions. For example, after initially probating Charles’s Estate and representing that the decedent held a one-third interest in the Company, Respondent Palmer Simmons, as trustee of the Trust, sought to reopen the matter after the filing of this case to assert that Charles’s Estate was the sole member of the Company. (R. p. 328). His rationale being that under Appellants’ newly contrived legal theories Charles was the sole member of the Company at the time of his death. (R. p. 328).

Even now Appellants devote an entire section of their Petition to Charles’s deposition testimony which they allege demonstrates the Company had four members—*i.e.*, Charles, his wife, and the Appellants (Palmer and Charlesetta). (R. p. 498 at p. 10, ln. 3-10).² It is mind boggling

² As explained in Respondent’s Brief, the question put to Charles is compound, asking about both members and managers so it’s entirely unclear what the import of this deposition testimony would be. *See* (Resp. Br. pp. 15 – 20) (which Respondents incorporate herein by reference).

that Appellants can suggest this deposition testimony has any probative value considering Appellants own sworn statements and arguments in this case are wholly inconsistent with this testimony.³ The bottom line is that the “facts”—at least as Appellants cast them—apparently change with the wind depending on what suits them best. The only undisputed fact is that Appellant Palmer had no qualms with misrepresenting or making contradictory representations to the courts.

Appellants want this Court to accept that an out-of-context excerpt from Charles’s deposition creates a question of fact. In reality, the only question this deposition testimony creates is: “How many contradictory stories can Appellants tell?” A party cannot rely on his own self-contradictions to create a question of fact. *See e.g., McMaster v. Dewitt*, 411 S.C. 138, 151, 767 S.E.2d 451, 458 (Ct. App. 2014) (providing that generally a party cannot manufacture a question of fact to defeat summary judgment by offering evidence that contradicts its own position or testimony). Therefore, this Court should deny Appellants’ Petition for Rehearing.

IV. Appellants’ argument that this Court ignored the terms of the Operating Agreement simply restates the meritless arguments previously briefed and rejected.

Appellants’ argument rests on the incorrect assumption that Charles was powerless to amend the Operating Agreement. This flawed assumption was fatal to Appellants’ appeal. It is

³ *See e.g.*, (R. p. 328) (Appellants’ recent Probate filing asserting Charles’s estate to be the sole member of the Company, which is inconsistent with the original Probate proceeding and also with Charles’s deposition testimony about alleged multiple members); *contra* (R. pp. 107-08) (the Company’s tax returns, signed under oath by Respondent Palmer, and identifying Respondents as members, which is also inconsistent with Charles’s alleged deposition testimony, and inconsistent with the Probate Court filing); *and* (R. pp. 310-11 & R. pp. 96-7) (assignment agreements and resolutions signed by Palmer and recognizing Respondents as members, which is also inconsistent with the Probate filing); *contra* (R. p. 377) (Affidavit of Palmer Simmons swearing the Trust, himself, and Charlesetta were 1/3 members, a position which is still further inconsistent with Charles’s alleged deposition testimony, as well as the sworn tax returns, and Palmer’s probate filing); *see also* (R. pp. 590 ln. 10 – 592 ln. 15) (Appellant’s trial counsel asserting that Palmer was a member of the company which is contrary to the Palmer’s affidavit and his Probate Court filing both of which asserted that Charles’s estate was the sole member).

likewise fatal to this Petition. As was more fully set forth in Respondents' Brief, both the plain language of the operating agreement as well as the law of South Carolina permitted Charles to amend or unilaterally waive the ministerial requirements of the operating agreement. *See* (Resp. Br. pp. 11-14) (explaining that Section 8.2 of the operating agreement provides that it "may be amended and modified from time to time by [Charles]."); *and citing Sanchez v. Tilley*, 285 S.C. 449, 452, 330 S.E.2d 319, 320 (Ct. App. 1985) and *Evatt v. Campbell*, 234 S.C. 1, 106 S.E.2d 447 (1959) for the proposition that "[a] written contract may be orally modified by the parties even if the writing itself prohibited oral modification."). Respondents incorporate the arguments previously made throughout the totality of their Respondents' Brief as if reasserted herein, which demonstrate that this Court did not misapprehend or overlook anything. Therefore, the instant Petition should be denied.

V. This Court properly dismissed Appellants' appeal of the trial court's order compelling Appellants' discovery responses.

This Court properly dismissed Appellants' appeal of the trial court's discovery order as interlocutory. Appellants' Petition claims this Court should nonetheless entertain this interlocutory appeal because the trial court's order mandates the disclosure of privileged information. However, just as they did on appeal, Appellants' Petition overlooks Appellants' failure to identify or log any purportedly privileged information as required by law. *See* Rule 26(b)(5)(A), SCRPC (mandating that "the party **shall make the claim expressly and shall describe the nature of the** documents, communications, or things not produced or disclosed in a manner that . . . will enable other parties to assess the applicability of the privilege or protection."); *and In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 168, 829 S.E.2d 707, 712 (2019) ("[T]he **party claiming the privilege has the burden** of establishing the confidential nature of the communication, including the absence of waiver.") (all emphasis added).

Having failed to offer any basis that the discovery order implicates any privileged information, Appellants' bald invocation of privilege is purely hypothetical and without any evidentiary support. Simply put, there is no basis to assume that the required discovery will disclose any privileged information because if any such material existed, it would have been logged as required by law. *See* (Resp. Br. pp. 24-31).

Moreover, Appellants declined to provide any purportedly privileged information to the trial court *in camera* when given the opportunity. Accordingly, this issue of whether the information subject to the order was privileged was neither raised to nor ruled on by the trial court. Appellants' argument is neither ripe nor preserved. *See e.g., BMW of N. Am., LLC v. Complete Auto Recon Servs.*, 399 S.C. 444, 454, 731 S.E.2d 902, 908 (Ct. App. 2012) (stating "a party **must** file a Rule 59(e), SCRPC motion to preserve an issue for review that has been raised to but not ruled upon by the trial court") (emphasis added, citation omitted); *see also* (Resp. Br. pp. 25-27). Therefore, even if this Court were to entertain the Appellants' interlocutory appeal (which it should not) there is no basis in the record on which it could reverse the trial court's ruling.⁴


CONCLUSION

For these reasons stated above, together with those set out in Respondents' Brief and elsewhere in the record, this Court should deny Appellants' Petition for Rehearing.

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⁴ Despite failing to provide a copy of the Trust to Respondents as ordered, Appellants make an impassioned plea predicated on the notion that this Court's holding will have the radical effect of cutting off "the vast majority of 14 grandchildren." This assertion is not correct, as it was clear from the original Probate of Charles's Estate that his one-third interest was deposited into the Trust for the benefit of his wife and presumably his other heirs upon her passing. Appellants have also repeatedly overlooked and misrepresented the fact that Respondent Marcus Simmons was an adopted child of Charles and his wife.

Respectfully submitted,



THURMOND KIRCHNER & TIMBES, P.A.
Thomas J. Rode, SC Bar No. 77480
15 Middle Atlantic Wharf
Charleston, SC 29401
Phone: 843-937-8000
Fax: 843-937-4200
Attorneys for the Respondents

-and-

MINOR, HAIGHT & ARUNDELL, P.C.
Ehrick K Haight, Jr. Bar No. 2446
Stacey S. Collins Bar No. 73360
Post Office Drawer 6067
Hilton Head Island, SC 29938
Phone: 843-785-8040
Attorneys for the Respondents

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PROOF OF SERVICE

I, hereby certify that the enclosed was served on the parties stated below by emailing a
copy of the enclosed document(s) to opposing counsel:

ainsley.tillman@fordwallace.com
ian.ford@fordwallace.com
mark.berglind@vmbllawfirm.com

This 22 day of August, 2024.

THURMOND KIRCHNER & TIMBES, P.A.

BY: *Kaitlyn Nobles*
Kaitlyn Nobles
paralegal